FILE COPY

FILED
APR 3 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1196

JOSEPH E. RAGEN, Warden, Illinois State Penitentiary,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, ex rel. JOHN H. ROONEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
208 South LaSalle St., Chicago 4, Ill.,
Attorney for Petitioner.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

GRAMPLIN-SHEALY COMPANY, CHICAGO 365

INDEX.

PAGE

Note on transcript references 2

Summary and short statement of the matters involved 3

Respondent's failure to exhaust state remedies 7

The holding of the Circuit Court of Appeals 8

Statement of the basis for this court's jurisdiction to review 11

The questions presented 11

Reasons relied upon for the allowance of the writ 12

Statement that the opinions delivered in the courts below have not been reported 13

Reference to the petition for concise statement of the grounds on which the jurisdiction of this court is invoked and for a concise statement of the case 14

Specification of errors intended to be argued 14

Argument:

I. The Seventh Circuit Court's holding that this court overlooked or misapprehended the Illinois law should elicit *certiorari* 15

II. *Certiorari* should be granted because of the Circuit Court's virtual holding that mere "bargaining with" a co-defendant for his testimony denied due process 19

Conclusion 21

CASES CITED.

Graham v. White-Phillips Co., 296 U. S. 27 ..... 10, 17
Lisenba v. California, 314 U. S. 219 ..... 12, 20
Lutz v. Ragen, 324 U. S. 760 8
People v. Andalman, 346 Ill. 149 17
People v. Austin, 329 Ill. A. 276 ..... 9, 17
People v. Garwood, 317 Ill. 578 10
People v. Green, 355 Ill. 468 18
People v. Lawson, 351 Ill. 507 17
People v. Rave, 392 Ill. 435 ..... 1, 9, 11
People v. Terrill, 362 Ill. 61 ..... 10, 17
People v. Rooney, 355 Ill. 613 6
U. S. ex rel. Bongiorno v. Ragen, 54 Fed. Sup. 973, aff'd. 146 Fed. 2d 349 7
U. S. ex rel. Foley v. Ragen, 52 Fed. Sup. 265, reversed 143 Fed. 2d 774 7
White v. Ragen, 324 U. S. 760 ..... 7, 8
Woods v. Nierstheimer, ... U. S. ..., 66 S. Ct. 996 (not yet officially reported) 1, 7, 8, 11

STATUTES CITED.

Coram Nobis Act (Ill. Rev. Stats. 1945, Ch. 110, par. 196) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No.

JOSEPH E. RAGEN, Warden, Illinois State Penitentiary,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, ex rel. JOHN H. ROONEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

Petitioner, the warden of the Illinois State Penitentiary, represents that the Circuit Court of Appeals for the Seventh Circuit, deciding the case of *United States ex rel. Rooney* v. *Petitioner* directing the district court to issue its writ of *habeas corpus,* has recognized that its decision is in conflict with this court's holding in *Woods* v. *Nierstheimer,* ... U. S. ..., 66 S. Ct. 996 (not yet officially reported). But it has held that this court's decision in the *Woods* case is in turn in conflict with the decision of the Supreme Court of Illinois in *People* v. *Rave,* 392 Ill. 435, on a question of Illinois law concerning the availability to respondent of statutory *coram nobis.* It reached this con-

clusion although the *Rave* case was cited to and considered by this court in deciding the *Woods* case.

It is petitioner's and the Illinois Attorney General's view that the decision of the Circuit Court of Appeals should be reversed. But it is of the utmost importance that district judges in Illinois be not confronted with a decision in their own circuit that declares in express terms that the *Woods* case was wrongly decided by this court and should not be followed by Illinois district judges.

The case affects the rights of several hundreds if not more than a thousand prisoners in Illinois. The great importance of the case is more fully explained hereafter.

Note on Transcript References.

Since this case reached the Circuit Court of Appeals upon a pauper's record, the same was not printed in that court. Accordingly, all references to the transcript must necessarily be made to the single, unprinted copy of the record filed with this petition. Petitioner will, of course, have the record printed here upon being furnished with an estimate of the cost.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The District Court for the Northern District of Illinois Eastern Division, Judge John P. Barnes presiding, refused to issue a writ of *habeas corpus* (R. 98) but certified probable cause for review of such refusal upon a petition for that writ filed by John H. Rooney (respondent here) (R. 100). Respondent is serving a sentence of life imprisonment in the Illinois penitentiary for murder (R. 26). He prepared his petition *pro se* but was represented by distinguished counsel in the Circuit Court of Appeals. The averments of the petition (R. 12-53), which were not contested and which we therefore must and do assume to be true, may fairly be cast in narrative form as follows:

Having been suspected and accused of the murder of one Stanley Gross in connection with a violent labor altercation in Chicago, respondent was apprehended in Wisconsin and, without warrant or process of extradition, was returned against his will to Chicago (R. 13).

On the trial which followed his indictment, he moved to suppress from the evidence a pair of field glasses which were unlawfully seized on an unlawful search. The motion was granted and the field glasses were suppressed. He complains, however, that the court permitted allusion in the testimony to his possession of a pair of field glasses on the night of the killing and before any illegal seizure thereof.

It appears that the conviction rested at least in part upon the testimony of a man named Alex Davison or Alex Davidson (both spellings appear in the record), whose testimony at the trial implicated respondent (R. 19). It further appears that Davidson was an accom-

plice in the killing and that he has received consideration in the form of leniency and employment on public payrolls for his testimony against respondent. It also appears that Davidson has made an affidavit, reproduced in full as Exhibit C to respondent's petition for writ of *habeas corpus* filed in the district court, and reprinted in full in the margin, recanting his testimony and averring that he gave evidence against respondent to escape prosecution for complicity in the murder, to secure a job on the public payrolls, for cash and other ulterior considerations. The affidavit (R. 44-46) is printed in full in the margin.[1]

---

[1] The text of Davidson's affidavit is as follows:

State of Illinois }
County of Cook } ss.

(Original on file in the personal file of Henry Berry, 7903-E, Board of Pardons asd Paroles, Springfield, Illinois.)

Alex Davidson, being first duly sworn upon his oath, deposes and says: that he is a resident of the City of Chicago, County of Cook, and the State of Illinois, and that he testified for the State of Illinois in the case of the *People of the State of Illinois* v. *John H. Rooney, Henry Berry, alias Hogan Berry, et al.*, in the Criminal Court of Cook County, before his Honor Judge Harry B. Miller, the presiding Judge of said trial, during the summer of 1933.

This affiant further states that he was arrested by the police officers of the State's Attorney's Office of Cook County for approximately one (1) week after the murder of Stanley Gross, who was killed on the 23rd day of May, 1933, while seated in an automobile in front of Goldblatt Brothers Store on Chicago Avenue, in the City of Chicago, County of Cook, and State of Illinois.

I was brought to the State's Attorney's Office and asked whether Hogan Berry was there. I denied Hogan was there and I was released.

About a week after the murder this affiant was arrested by police officers and taken to the State's Attorney's Office, located at 26th and California Avenue, in the City of Chicago, County of Cook and State of Illinois, and there questioned by Mal Coghlin and Wilbur Crowley, both Assistant State's Attorney's of the City of Chicago, County of Cook, and State of Illinois, for a period of approximately thirty minutes. They asked me what my occupation was and I told them that I was employed as bartender, porter and caretaker of the Circular Distributors Hall, located at approximately 9 N. Racine Avenue, in the City of Chicago, County of Cook and State of Illinois, and that I started employment there on the 22nd of May, A. D. 1933. I was asked if I was in the said Union Hall of the Circular Distributors Hall on the morning of May 23rd, A. D. 1933. They asked me if I remained in the Union Hall from the evening of the 22nd of May, A. D. 1933, to and including the night the State's Attorney's Office. About two or three days later, I was arrested by Officers of the State's Attorney's Office, County of Cook and the morning of May 23rd, 1933 A. D., and I replied there was only John Rooney, one of the defendants in the case in which I testified for and in behalf of the People of the State of Illinois. I was released and left the State's Attorney's Office. About two or three days later, I was

It will be noted that although it does indeed appear from this affidavit that Davidson changed his story to the police, first refusing to implicate and later implicating respondent, it does *not* appear that the State's Attorney's office knew which of Davidson's two stories was true or that Davidson's testimony at the trial was suborned by the State's Attorney's office or any other public officials. For aught that appears explicitly or by fair inference, the question of which of Davidson's stories was true was fairly left to the jury on the trial.

This affidavit was not made until long after respondent's conviction had been affirmed.

Respondent, represented by William Scott Stewart as his counsel, obtained a review of his conviction by the Supreme Court of Illinois upon writ of error (R. 15). That

---

arrested by Officers of the State's Attorney's Office, County of Cook and the State of Illinois, and taken to the State's Attorney's Office, located in said County and there was again questioned by Wilbur Crowley and Mal Coghlin. I was asked whether or not Hogan Berry was in said headquarters on the evening of May 22nd, 1933, and the morning of May 23rd, 1933, by the said Wilbur Crowley and Mal Coghlin. I was told that if I testified for the State that I would not be prosecuted in this case and that I would be taken care of by the State's Attorney's of Cook County, and that I would be given employment. I then stated that Henry Berry, alias Hogan Berry, was in the Union Hall on the evening of the 22nd of May 1933, and the morning of May 23rd, 1933, with John Rooney, Rose Rizzo and myself.

Affiant further states that he lied in respect to his testimony with reference to Henry Berry, alias Hogan Berry, and that the truth of the matter is that Henry Berry, alias Hogan Berry, remained in the Union Headquarters of the Circular Distributors Union from five (5) P. M. of the evening of May 22nd, 1933, and did not leave the premises of the said Union Headquarters until seven o'clock on the morning of May 23rd, 1933, at which time he left intoxicated and was helped into a cab by persons I do not recall at this time.

On the evening of May 22nd, 1933, I worked as a bartender in the said Union Headquarters from the hour of 10:00 P. M. until after 7:00 A. M. on the morning of May 23rd, 1933.

This affiant further states that the said Henry Berry, alias Hogan Berry, was in a helpless state of intoxication from the hour of 11:00 P. M. May 22nd, 1933, to and until the time he left the said Headquarters at the hour of about 7:00 A. M. on May 23rd, 1933, at which time he was helped from the Headquarters, down the stairs and in a cab that was waiting.

This affiant further states that his testimony in the said case in which he testified that Henry Berry, alias Hogan Berry, said, "You ought to

court's opinion appears at 355 Ill. 613. Respondent contended in that court that much incompetent evidence was received against him, that his guilt was not proved beyond all reasonable doubt, and that verbal allusion to respondent's possession of field glasses on the night of the murder should have been stricken because the glasses themselves had been illegally seized. These contentions were overruled by the Supreme Court of Illinois. No attempt was made to have respondent's conviction and the Illinois Supreme Court's affirmance thereof reviewed by writ of *certiorari* from the Supreme Court of the United States.

In seeking discharge by *habeas corpus* in the federal courts, respondent asserts many claims of rights but they fall into two categories: *first,* matters which occurred before or at his trial, which either were or could have been raised

---

see the way we let him have it"; meaning John Rooney, was not and is not true.

This affiant further states that the time of his second arrest and during the time and before and also the time during the trial of the said defendants in this matter, he was maintained by the State's Attorney of Cook County, in the Palmer House, a hotel located in the City of Chicago, County of Cook and State of Illinois, and also in the Clayton Hotel, another hotel in the City of Chicago, County of Cook, and State of Illinois, and that all food, cigars, cigarettes and entertainment, such as being taken by Officers of the State's Attorney's Office, of the County of Cook, and State of Illinois, to baseball games, theaters and other places of amusement, and expenses were paid by the State's Attorney's Office of the County of Cook, and State of Illinois. That the State's Attorney's Office of the County of Cook and State of Illinois did obtain employment for this affiant in the Street Department of the City of Chicago and State of Illinois.

This affiant further states that since the time of this trial, the matter of his testimony in the Criminal Court of Cook County has been preying upon his mind, leaving him in a restless and worried condition, thinking and knowing that Henry Berry, alias Hogan Berry, is an innocent man and that a miscarriage of justice has been done.

This affiant further states that he has looked up relations of the said Henry Berry, alias Hogan Berry, and explained the contents of this affidavit to them.

The purpose of this affidavit is for the presentation to the Board of Pardons and Paroles, of the State of Illinois, and in behalf of the said Henry Berry, alias Hogan Berry, in order that he may be pardoned, for he is innocent of the crime for which he is now serving time in the penitentiary at Joliet, Illinois.

/s/ Alex Davidson
(THUMBPRINT)

Subscribed and sworn to before a notary public on December 17, 1936.

or considered on that trial and on writ of error, and which could have been made the basis for *certiorari* from the United States Supreme Court; and *second*, alleged rights predicated upon Davidson's affidavit of recantation, which was not a part of respondent's record on the trial resulting in his conviction.

Mention should also be made of the fact asserted by petitioner (R. 20-21) that until Judge Barnes' decisions in the Northern District in *U. S. ex rel. Bongiorno* v. *Ragen*, 54 Fed. Sup. 973, affirmed by the Circuit Court of Appeals in 146 Fed. 2d 349, and *U. S. ex rel. Foley* v. *Ragen*, 52 Fed. Supp. 265, reversed by the Circuit Court of Appeals in 143 Fed. 2d 774, prisoners were not allowed to send petitions for *habeas corpus* from inside the walls of the penitentiary. Respondent says that this practice disabled him from seeking this court's writ of *certiorari* to review his original conviction. But respondent concedes that since the *Bongiorno* decision such petitions and all other applications for review *in forma pauperis* may freely be sent.

Respondent's Failure to Exhaust State Remedies.

Illinois' statute authorizing proceedings in the nature of the common law writ of error *coram nobis* in lieu of that writ itself, which is quoted in the margin,[2] has been before this court in *White* v. *Ragen*, 324 U. S. 760, *Lutz* v. *Ragen*, *id.*, a companion case to *White* v. *Ragen*, and *Woods* v. *Nierstheimer*, 66 S. Ct. 996. **Respondent has made no**

[2] "The writ of error *coram nobis* is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice. When the person entitled to make such motion shall be an infant, *non compos mentis* or under duress, at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years.' (Ill. Rev. Stats. 1945, Ch. 110, par. 196.)

effort to file a petition for relief under the Coram Nobis act above cited.

He did file a petition for writ of *habeas corpus* in the Circuit Court of Will County, Illinois, in which county he was and still is incarcerated; and when that writ was denied (R. 21, 48-50) sought this court's writ of *certiorari*, but was refused the same for the reason that the application was not made within the time provided by law. He then petitioned the criminal court of Cook county, the jurisdiction in which he was tried and convicted, for its writ of *habeas corpus*. The writ was denied (R. 107). This court refused *certiorari* on December 10, 1945 (R. 108).

The Holding of the Circuit Court of Appeals.

Since the opinion of the Circuit Court of Appeals (R. 154-165) did not advert to any of the matters complained of by respondent as improperly occurring upon his trial, we assume that the Circuit Court of Appeals acquiesced in petitioner's contention that no federal question was raised by respondent's insistence that verbal allusion to field glasses as being in his possession at the time of the murder denied him due process merely because these field glasses were later illegally seized.

But the Circuit Court of Appeals did hold, contrary to petitioner's contention, that Davidson's affidavit of recantation not only effectively charged that respondent was convicted on perjured testimony, but was equally effective in accusing state prosecuting officials with *knowledge* that the testimony was false.

The Circuit Court of Appeals, rejecting petitioner's contention that respondent had not demonstrated an exhaustion of state remedies under *White* v. *Ragen*, *Lutz* v. *Ragen*, and *Woods* v. *Nierstheimer*, cited *ante*, explicitly recognized that its decision in the instant case was inconsistent with

this court's holding in the *Woods* case, but made it clear that it thought that this court ignored the decision of the Illinois Supreme Court in *People* v. *Rave*, 392 Ill. 435. The Circuit Court of Appeals said:

> "The opinion in the *Rave* case antedates the opinion in the *Van Woods* case by some four months. It is therefore, difficult to comprehend the statement of the court in the Van Woods case upon any basis other than that the law of Illinois, as decided by the Supreme Court, in the Rave case, was not called to its attention. * * *" (Emphasis supplied.) (R. 164.)

But the fact is that the Rave case was cited and argued to this court at page 12 of the brief for petitioner in the Woods case. This fact was called to the attention of the Circuit Court of Appeals on petition for rehearing (*Petition for Rehearing*, p. 2), but nevertheless the Circuit Court of Appeals allowed its opinion to stand and to include its statement that

> "the law of Illinois, as decided by the Supreme Court in the Rave case, was not called to its [this court's] attention. * * *"

The Circuit Court of Appeals failed to give recognition to the fact that although the *Rave* case did hold that *coram nobis* was not available in that case because the conviction had occurred more than five years prior to the application for that remedy, the *Rave* case, unlike the Woods case and unlike the instant case, contained no charge that the prisoner's attempts to communicate with state courts were intercepted or frustrated.

The Circuit Court of Appeals also read the decision of the Appellate Court of Illinois in *People* v. *Austin*, 329 Ill. App. 276, as holding that Illinois courts will not entertain applications for *coram nobis* after the lapse of a period of five years, even though a prisoner's efforts to communicate with the courts was intercepted. But the Circuit Court of Appeals refused to give effect to the Illinois rule that all

state and federal constitutional questions are waived by taking the case to the Appellate, instead of the Supreme Court (*People* v. *Terrill*, 362 Ill. 61; *People* v. *Lawson*, 351 Ill. 507; *People* v. *Garwood*, 317 Ill. 578 and *People* v. *Andalman*, 346 Ill. 149), and also refused to follow this court's holding in *Graham* v. *White-Phillips Co.*, 296 U. S. 27, that decisions of the Illinois Appellate Court do not invoke *stare decisis* and are not binding on federal courts in ascertaining the Illinois law.

Reaching the substantive question whether the statements in Davidson's affidavit, treated as a part of respondent's pleading, charge lack of federal due process, the district court held, contrary to petitioner's contention, that Davidson's averments that he first denied that respondent was guilty of the crime and then changed his story so as to affirm respondent's guilt in consideration of promises of leniency and a chance for a job on the public payrolls amounted to a charge not only that respondent was convicted on perjured testimony but amounted to a further charge that Illinois prosecuting officials *knew* that such testimony was perjured.

Respondent raises the question whether public officials can be deemed to be charged with knowledge that the prosecution's testimony is perjured because a witness, having first denied his own or another's complicity in a crime, implicates a co-defendant after a promise of leniency.

It was petitioner's contention, rejected by the Circuit Court of Appeals, that due process requires honesty and fairness on the part of public officials, not of witnesses, and that when the prosecuting officials have reason to believe that a defendant is guilty, obtain corroborating evidence of that fact from an accomplice and offer the testimony of such accomplice as a witness with full disclosure of the fact that he is an accomplice and has been promised immunity or other leniency, due process is afforded in the absence

of a positive showing (or positive and undenied averment in a pleading) that the state officials knew that the testimony was false.

The question is an important one; for public officials throughout the country "bargain" with accomplices to turn state's evidence and if the charge of such a bargain charges a denial of due process, this court should so declare. If such bargaining does not imply official knowledge that the accomplice's testimony is false, the Circuit Court of Appeals should be reversed.

Statement of the Basis for This Court's Jurisdiction to Review.

This court's jurisdiction is invoked under Section 240 of the United States Judicial Code (Title 28, U. S. C. A. sec. 347).

The Questions Presented.

The questions presented are:

1. Did the Circuit Court of Appeals err in substituting its own reading of *People* v. *Rave*, 392 Ill. 435 for this court's reading of that case in *Woods* v. *Nierstheimer*, ... U. S. ..., 66 S. Ct. 996, and in thereupon reversing this district court?

2. Did the Circuit Court of Appeals err in holding that respondent had exhausted adequate state remedies (or in holding that he had no adequate state remedies) and in therefore reversing the district court's refusal to take jurisdiction of the case?

3. Did the Circuit Court of Appeals err in holding that averments and affidavits charging that respondent was convicted upon perjured testimony, there being no averment that any prosecuting official knew that the testimony was perjured, imported a charge of denial of due process of law?

Reasons Relied Upon for the Allowance of the Writ.

As appears from the foregoing Statement of the Case and as is made clear in the Supporting Brief, *post*, the Circuit Court's decision in this case confronts Illinois district judges with a repudiation of this court's holding in *Woods* v. *Nierstheimer*, cited above, on a question that arises almost daily in district federal courts and that, as this court is aware, involves the claims of hundreds of Illinois prisoners.

Illinois cannot overemphasize the very great importance of this question. The Attorney General assures this court that the problems and dilemmas precipitated by the Circuit Court's decision are crucial.

Very important, too, is the question whether the Circuit Court's intimation that charges that bargaining with an alleged accomplice for his testimony constitutes *per se* a denial of due process of law. This practice is inveterate and widespread. Its propriety has been recognized by this court in *Lisenba* v. *California*, 314 U. S. 219. If the Circuit Court's opinion is to become a precedent, not only in Illinois but in all other states, it should have the sanction of this court's approval expressed in an opinion. But we contend that the Circuit Court's view on this question is wrongly conceived and that it should be corrected.

WHEREFORE, petitioner prays this court to issue its writ of *certiorari* to review the opinion and judgment of the Circuit Court of Appeals for the Seventh Circuit in this cause.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
208 South LaSalle Street,
Chicago 4, Illinois
Attorney for Petitioner.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No.

JOSEPH E. RAGEN, Warden, Illinois State Penitentiary,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, ex rel. JOHN H. ROONEY,

Respondent.

BRIEF IN SUPPORT OF THE FOREGOING PETITION.

Statement That the Opinions Delivered in the Courts Below Have Not Been Reported.

The opinions of the district court and the Circuit Court of Appeals have not been officially reported at the time of the writing of this brief. Both opinions appear in full in the record.

The opinion of the district court appears at Record page 98. The opinion of the Circuit Court of Appeals appears at Record pages 154-165.

Reference to the Petition for Concise Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked and for a Concise Statement of the Case.

The facts in this case are of such simplicity that they were stated in full in the petition for the writ of *certiorari, ante.* Reference to that petition is made for "A Concise Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked," as well as "A Concise Statement of the Case Containing All That Is Material to the Consideration of the Questions Presented."

Specification of Errors Intended To Be Argued.

1. The Circuit Court of Appeals erred in holding that the respondent had no adequate remedy in the state courts for the assertion and vindication of his claims of denials of due process.

2. The Circuit Court of Appeals erred in holding that the respondent's averments and Davidson's affidavit effectively charged state prosecuting officials with knowledge that respondent was being prosecuted on perjured testimony.

3. The Circuit Court of Appeals erred in reversing the judgment of the district court.

ARGUMENT.

AN INDEX AND SUMMARY OF THE ARGUMENT APPEARS IMMEDIATELY PRECEDING THE PETITION, ANTE.

I.

The Seventh Circuit Court's holding that this Court overlooked or misapprehended the Illinois law should elicit certiorari.

The Circuit Court of Appeals has said in the instant case:

> "The opinion in the *Rave* case antedates the opinion in the *Van Woods* case by some four months. It is, therefore, difficult to comprehend the statement of the court in the *Van Woods* case upon any basis other than that the law of Illinois, as decided by the Supreme Court in the *Rave* case, was not called to its attention. * * *"

The Circuit Court's statement is incorrect. The fact is, as counsel for the petitioner conceded in his brief and on oral argument in the Circuit Court of Appeals, that the *Rave* case was cited to this court in the *Woods* case by Mr. Edward H. Levi, counsel appointed by this court to represent Woods, at page 12 of his brief in the *Woods* case.

Counsel in the instant case said in his brief in the Circuit Court of Appeals (the following language is quoted in the petitioner's petition for rehearing and hence is a part of the record in this case):

> "The issue appears to us to be conclusively determined by the decision in *People* v. *Rave, and we would rest the point were it not for the fact that the case was relied on by petitioner Woods in the United States Supreme Court.* * * *" (Emphasis supplied.)

Nevertheless, the Circuit Court of Appeals adhered to its declaration that this court had overlooked and misapprehended the teachings of the Illinois Supreme Court in the *Rave* case.

We agree that *if* a decision of this court is in fact inconsistent with authoritative decisions of state courts, a Circuit Court of Appeals must follow the state court's decisions and not those of this court when the question is one of state law.

But this court's reading of the *Rave* case was more discerning than is that of the Circuit Court of Appeals. In the *Rave* case, although the prisoner had been confined in the penitentiary for more than five years, he made *no showing* that his attempts to communicate with the state or federal courts had been interfered with. He predicated his claim of duress on the mere contention, nakedly standing alone, that penal durance is in itself such duress under a proper construction of Illinois statutory law as to toll the Illinois statute of limitations.

It may be true, as a matter of fact *dehors* the record, that Rave's attempts to communicate with state and federal courts were intercepted. But that fact was neither alleged nor made the basis of any claim on the part of Rave.

Therefore, the *Rave* case did *not* decide the question presented by either the *Woods* case or the instant case, namely, the question: May a prisoner who has been confined in the penitentiary for more than five years *but whose right to communicate with either state or federal courts has been intercepted by the Warden, until a time within less than five years of the commencement of his coram nobis proceeding,* seek vindication of his charges of want of due process by *coram nobis* proceeding in the state court.

The Circuit Court of Appeals cites *People* v. *Austin*, 329 Ill. App. 276, which does imply that the statute of limitations as to *coram nobis* proceedings is not tolled by interception of a prisoner's attempts to communicate with courts. But the *Austin* case is a decision of the appellate court; and under Illinois appellate jurisprudence, one who appeals to the appellate court waives all questions arising under the state and federal constitutions. (*People* v. *Terrill*, 362 Ill. 61; *People* v. *Lawson*, 351 Ill. 507; *People* v. *Garwood*, 317 Ill. 578; and *People* v. *Andalman*, 346 Ill. 149.)

Furthermore, decisions of the appellate court are no more authoritative under Illinois' doctrines of *stare decisis* than are decisions of the circuit courts, county courts or justices of the peace.

This court's decision in *Graham* v. *White-Phillips Co.*, 296 U. S. 27, holds that this is so even where the appellate court decision construes a state statute. In the *White-Phillips case*, cited above, the Supreme Court of the United States adopted its own construction of an Illinois statute although it recognized that its decision flatly contradicted the construction placed upon the same statute by an Illinois appellate court.

The Circuit Court's decision in the instant case precipitates the following very grave crises in the federal jurisprudence of *habeas corpus* in Illinois:

Hundreds of Illinois prisoners seek access to federal district courts by application for *habeas corpus*. These prisoners charge matter *dehors* the record, such as that they were coerced into pleading guilty, that they were betrayed by counsel appointed by the court, that they were convicted upon perjured evidence upon the connivance of public officials, and that they were prevented from

summoning witnesses who would have testified the material facts in their defense.

According to this court's holding in the *Woods* case, it must be presumed that Illinois affords a remedy by *coram nobis* in such cases even after five years provided, at least, that state officials have frustrated the petitioner's attempts to communicate with state courts during that period of time. (See *People* v. *Green*, 355 Ill. 468, cited by this court in the *Woods* case.)

This court said in the *Woods* case (not yet officially reported), 66 S. Ct. 996, at 999:

> "* * * Nor do the denials of petitioner's applications for *habeas corpus* present a federal question merely because the five-year statute of limitations on the statutory substitute for the writ of error *coram nobis* has expired. Petitioner claims that this leaves him without any remedy in the state courts. But we do not know whether the state courts will construe the statute so as to deprive petitioner of his right to challenge a judgment rendered in violation of Constitutional guarantees where his action is brought more than five years after rendition of the judgment. Nor can we at this time pass upon the suggestion that the Illinois statute so construed would itself violate due process of law in that a denial of that remedy, together with a denial of the writ of *habeas corpus*, would, taken together, amount to a complete deprivation of a state remedy where Constitutional rights have been denied. We would reach that question only after a denial of the statutory substitute for the writ of error *coram nobis* based on the statute of limitations had been affirmed by the Supreme Court of the state. * * *"

This court's unanimous declaration above quoted was made after the *Rave* case had been cited to and considered by it in the *Woods* case. Therefore, if this court's decision in the *Woods* case and the Circuit Court's decision in the instant case are both to stand, district judges in Illinois will be confronted by declarations of this court that are

inconsistent with an opinion in their own circuit court of appeals upon a question which arises almost daily in Illinois federal courts and which involves the rights of hundreds of prisoners.

We think that this court should adhere to its ruling in the *Woods* case and reverse the Circuit Court's decision in the instant case. But if this court is to acquiesce in the Circuit Court's repudiation of its decision in the *Woods* case, it should, for the guidance of district judges, Illinois lawyers and the prisoners themselves, grant *certiorari* and itself retract its holding in the *Woods* case in unmistakable terms.*

We therefore respectfully urge this court to grant its writ of *certiorari* in this very important case.

II.

Certiorari should be granted because of the Circuit Court's virtual holding that mere "bargaining with" a co-defendant for his testimony denied due process.

Davidson deposes in his affidavit of recantation that the testimony that he gave against respondent at respondent's trial was perjured and that respondent was in fact innocent. But it does *not* charge that the state prosecuting officials had *knowledge* that his testimony was false. It does appear that his statements first exonerated, then implicated, respondent; and it appears that he was given very substantial concessions for his testimony against respondent.

---

* An incidental but, we think, important consideration is that Illinois judges read decisions of this court and the Circuit Court of Appeals with respect, if not as authoritative, on questions of Illinois law. If Illinois judges follow the *Woods* case, thereby remitting the prisoner to the federal courts, and district judges follow the instant case, re-remitting such prisoners back to the state courts, very serious confusion in cases involving the liberty and alleged rights of hundreds of prisoners is certain to ensue.

But if the Circuit Court's opinion is to stand, it introduces into constitutional jurisprudence a principle of revolutionary importance, namely, the principle that mere bargaining with a co-defendant for his testimony, without positive knowledge on the part of prosecuting officials that his testimony is false, denies due process to a prisoner even though the fact of such bargaining is fully disclosed to the jury on the trial.

The Circuit Court's decision is, we submit, at variance with this court's holding in *Lisenba* v. *California*, 314 U. S. 219. In that case this court, considering a case in which a defendant was convicted of murder and sentenced to death upon the testimony of an accomplice, where such testimony was "bargained for" by promises of leniency, said, at page 227:

> "• • • The Fourteenth Amendment does not forbid a state court to construe and apply its laws with respect to the evidence of an accomplice. There is no adequate showing that there was a corrupt bargain with Hope, and the practice of taking into consideration, in sentencing an accomplice, his aid to the State in turning state's evidence can be no denial of due process to a convicted confederate. • • •"

A situation classically typical of prosecution methods throughout the United States occurs when one of several persons suspected of a crime first denies his guilt and that of his alleged accomplices, is then offered leniency or other concession, and admittedly in contemplation of and presumably in consideration for such concession, testifies against co-defendants at the trial. In such cases, the co-defendant who "turned state's evidence" is subjected to a cross-examination upon which it plainly appears that his testimony is the result of an offer of possible, probable or even promised lenity in the matter of his sentence. Not infrequently, as in the instant case, the charges are dismissed as to the co-defendant.

In many of such cases admittedly the prosecuting attorneys do not *know* whether the confederate is telling the truth or committing perjury. That question is left to a jury upon full disclosure of the interest of the accomplice in helping to secure a conviction of co-defendants.

If this practice is to be denounced either because (a) it is *per se* illegal or because (b) knowledge of the probable falsity of the accomplice's testimony is to be imputed to the prosecuting attorneys on the theory that induced testimony is presumably false, surely this court should say so in no uncertain terms; for such concessions are usual inducements to accomplices. But if this practice does not deny constitutional due process (cf. *Lisenba* v. *California*, cited above), then the Circuit Court's decision in the instant case should not become a precedent for discharging thousands of other state prisoners throughout the nation convicted upon the testimony of an accomplice where such testimony is procured by concessions.

Conclusion.

For the reasons suggested in the petition and argued in this brief, it is respectfully submitted that this case is very clearly of such great importance as to elicit this court's writ of *certiorari*.

It is further submitted that upon review by this court the judgment of the Circuit Court of Appeals for the Seventh Circuit should be reversed.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
208 South La Salle Street,
Chicago 4, Illinois,
Attorney for Petitioner.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 22 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 1196

JOSEPH E. RAGEN, Warden, Illinois State Penitentiary,

Petitioner

vs.

THE UNITED STATES OF AMERICA, ex rel. JOHN H. ROONEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ALBERT E. JENNER, JR.,
ROGER W. BARRETT,
11 South La Salle Street,
Chicago 3, Illinois,
Counsel for Respondent.

Scheffer Printing Company, Del. 7171

INDEX.

PAGE

Preliminary Statement 1

Opinion Below 1

Statement of the Case 2

Argument:

Point I. The Circuit Court of Appeals properly held that in order to exhaust state court remedies so as to vest the federal court with jurisdiction, it was not necessary to pursue the Illinois statutory substitute for the common law writ of error *coram nobis*, because the five year limitation period within which the remedy is required to be brought, had elapsed and the remedy was therefore not available 9

Point II. The Circuit Court of Appeals properly held that the petition for habeas corpus, with or without the attached affidavits sufficiently alleges that the perjured testimony, through the use of which the conviction was obtained, was procured and used with the knowledge or active connivance of the prosecution 20

Conclusion 25

Table of Cases.

Blair v. Commissioner, 300 U. S. 5 14

Bowen v. Johnston, 306 U. S. 19 23

Cochran v. Kansas, 316 U. S. 255 22

Ex Parte Hawk, 321 U. S. 114 16

Fidelity Union Trust Co. v. Field, 311 U. S. 169 14

Table of Cases (continued):

PAGE

Graham v. White-Phillips Co., 296 U. S. 27 .....13, 14
Holiday v. Johnston, 313 U. S. 342 23
Hysler v. State of Florida, 315 U. S. 411 3
Mooney v. Holohan, 294 U. S. 103 .....13, 15
People v. Austin, 329 Ill. App. 276 13-15
People v. Rave, 392 Ill. 435 10
People v. Rooney, 355 Ill. 613 .....7, 10
People v. Sprague, 371 Ill. 627 12
People v. Touhy, ... Ill. ..... (March 19, 1947, No. 29984) 12
Rice v. Olson, 324 U. S. 786 23
Rooney v. Ragen, 324 U. S. 851 9
Stoner v. New York Life Ins. Co., 311 U. S. 464 14
Tomkins v. Missouri, 323 U. S. 485 23
United States ex rel. Howard v. Ragen, 59 F. Supp. 374 (Ill.) 26
Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538 14
West v. A. T. & T. Co., 311 U. S. 223 14
Woods v. Neirstheimer, 328 U. S. 211, 66 S. Ct. 996 ....3, 16
Woods v. People of Illinois, ... Ill. ..... (September Term, 1946, No. 29747) 19

STATUTES.

Illinois Revised Statutes 1945, Chapter 110, Section 196 .....9, 10
Illinois Revised Statutes 1945, Chapter 37, Section 41 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1196

JOSEPH E. RAGEN, Warden, Illinois State Penitentiary,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, ex rel. JOHN H. ROONEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PRELIMINARY STATEMENT.

Counsel for respondent were appointed by the Circuit Court of Appeals to represent Mr. Rooney in that court. The question whether the decision of that court should be reviewed by the United States Supreme Court is believed to be so closely related to the proceedings before the Circuit Court of Appeals as to render the preparation of this brief in opposition to the petition for writ of certiorari a part of counsel's obligation to the Court and to Mr. Rooney.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in 158 F. 2d 346 (R. 86).

STATEMENT OF CASE.

John H. Rooney, respondent here, filed a petition for writ of habeas corpus in the District Court for the Northern District of Illinois, Eastern Division, on May 31, 1944 seeking his release from the Illinois State Penitentiary (R. 5). A general motion to dismiss, challenging the sufficiency of the petition, was filed by Joseph E. Ragen, Warden of the Illinois State Penitentiary, petitioner here (R. 52). The motion was sustained and the petition was dismissed without opinion by the District Court (R. 62). A certificate of probable cause was issued by the District Court (R. 63), and on appeal, the Circuit Court of Appeals for the Seventh Circuit in a unanimous opinion (R. 86), determined that the District Court had jurisdiction and that the petition for habeas corpus stated a cause of action of which a federal court could take cognizance, and remanded the cause to the District Court for a hearing on the merits of the petition.

Petitioner here seeks a review of the decision of the Circuit Court of Appeals, contending that the Court erred in deciding (1) that Rooney had exhausted all State court remedies available to him, so as to vest the federal court with jurisdiction; and (2) that the petition for habeas corpus, prepared as it was without the aid of counsel substantially alleged that the perjured testimony, by which the conviction was obtained, was procured by and thereafter used with the knowledge or active connivance of the prosecution.

These are the only issues raised by the petition. Although petitioner has not made a complete statement of the facts relating to other matters considered by the Circuit Court, and has made unwarranted assumptions as to the decision of the Court on those matters, we do not

deem it appropriate to discuss those facts or that part of the decision in this brief. Petitioner has prefaced his petition with an unwarranted statement that the Circuit Court's decision on the first of these two issues is admittedly in conflict with the decision of this court in *Woods* v. *Nierstheimer*, 328 U. S. 211, 66 S. Ct. 996. As will be shown, there is no such conflict.

Petitioner admits that the habeas corpus petition sufficiently alleges that the conviction was based on perjured testimony (Pet., p. 3, 19) but contends that the petition does not sufficiently allege knowledge by the prosecuting officers. Therefore the allegations relating to the prosecuting officer's knowledge that the testimony of Davidson used to convict Rooney was perjured must be considered in detail.

Petitioner does not fairly state the material averments of the petition, all of which were admitted by the motion to dismiss. The various averments, considered together, disclose a sordid, studied, continuous, and affirmative course of conduct on the part of the prosecuting officers of the State which fully justified the United States Circuit Court of Appeals in holding that the petition made ou a case within the decision of this Court in *Hysler* v. *State of Florida*, 315 U. S. 411.

This is not merely a case involving turning State's evidenced coupled with a promise of immunity as Petitioner would have this Court believe. Rather, it involves an elaborate and shameful course of action by the State, meriting vigorous condemnation. Whatever may be the privileges of the State under appropriate circumstances in bringing about the apprehension and conviction of criminals, the bounds of decency, fairness, and propriety were outrageously flaunted and abused here.

In his petition, Rooney alleges that his conviction could not have been obtained without the testimony of one Alex Davidson (R. 13), who perjured himself at the trial (R. 13) and

> "• • • testified for the State so that he would not be prosecuted for the crime and because the State's Attorney promised him employment. • • •"
>
> "There seems to be no doubt that the Assistant State's Attorney who prosecuted the case were aware that their principal witness was an untruthful individual and highly incompetent. Nevertheless, they used this confessed perjurer, and neither they nor the trial Judge would permit Defense Counsel Stewart to establish that this witness had a police record." (R. 13).

Immediately following the foregoing, these further averments appear in the petition for habeas corpus (R. 13-14):

> " 'If a state, whether by the active conduct or the connivance of the prosecution, obtains a conviction through the use of perjured testimony, it violates civilized standards for the "trial" of guilt or innocence and thereby deprives an accused of "liberty" without "due process of law."
>
> "*Hysler* v. *State of Florida*, Fla., 1942, 62 S. Ct. 688, 315 U. S. 411, 86 L. Ed. 932, affirming 1 So. 2d 628, 146 Fla. 593, certiorari granted, 1941, 61 S. Ct. 1113, 313 U. S. 557, 85 L. Ed. 1518.
>
> " 'Under this clause (14th Amendment) a federal court has authority to discharge a prisoner upon a writ of habeas corpus where it is made to appear that officials connected with trial in state court knowingly procured false testimony or knowingly perpetrated a fraud upon the court or defendant."
>
> "*U. S. ex rel. Lesser* v. *People of State of New York*, D. C. N. Y. 1940, 34 F. Supp. 730 affirmed, 1941, 117 F. 2d 30."

The petition alleges that the petitioner "was deprived

of due process, and that he has been restrained of his liberty and is being restrained of his liberty contrary to the provisions of the Illinois Statutes, the Illinois Constitution, the 4th and 5th Amendments of the Bill of Rights, and Article 4 and the 14th Amendment of the United States Constitution." (R. 18).

Among the exhibits attached to and made a part of the petition is a copy of an affidavit of Alex Davidson (R. 37-40). The affidavit, one of two made by Davidson, discloses that Davidson first denied any knowledge of the crime, but changed his story upon being promised immunity and other considerations. The affidavit states:

> "• • • I was told that if I testified for the State that I would not be prosecuted in this case and that I would be taken care of by the State's Attorney's [sic]—of Cook County, and that I would be given employment. • • •" (R. 38).

Petitioner here admits that Davidson made this affidavit "recanting his testimony and averring that he gave evidence against respondent to escape prosecution for complicity in the murder, to secure a job on the public payrolls, for cash and other ulterior considerations." (Pet., p. 4).

There is also attached to the petition an amendment (R. 46), which discloses that at the trial Davidson, despite these facts, was permitted by the State's Attorney directly to perjure himself to the Court and jury in the matter of the promise of immunity accorded him by the State. He was asked, "Have you been indicted in this case?" And he answered:

> "Never. Nobody talked to me about the possibility of my being indicted. Nobody ever suggested that I might be. It occurred to me that I might be. When it occurred to me I did not talk to anybody about

it in these interviews. I never asked the State's Attorney what he might do with me. Nothing like that had come up in the conversations. *I do not know what will happen to me. I have no idea.* I am getting some money—$12; $10 a week my wife gets and $2.00 a week I get for cigarettes and so forth. In addition to that my keep is being paid for over there at the Palmer House, by the State's Attorney." (R. 47).

Davidson also failed to mention that among the various "considerations" extended to him by the State's Attorney was employment on public payrolls. The petition by way of an amendment (R. 47, 50) states that shortly after this trial Davidson was employed by the city as a laborer and that he was carried on the payroll as such for a good portion of the time during the latter part of 1933 and for some five or six years subsequent thereto. Petitioner here admits these allegations (Pet., p. 4).

The petition disclosed a continued course of action before, during and after trial on the part of the State far beyond anything within legitimate bounds. At the very outset it appears that Rooney was kidnapped in the State of Wisconsin by a squad of State's Attorney's police and shanghaied to Chicago. The concerted efforts to obtain a conviction irrespective of the means employed, is vividly illustrated by the testimony of Police Officer Charles W. Pribyl, a prosecution witness:

"We did not have a warrant when we went up to Wisconsin. We did not obtain any legal extradition papers of any kind. When we raided the Berwyn [Illinois] place we did not have a warrant. We did not have any search warrant. The owner of the building [in Berwyn] was in charge of the premises. There was nobody in charge of the flat. We gained admittance with a pass key from the owner. When we went to the Union Headquarters [in Chicago] and seized the records and raided it we did not have a warrant.

> We did not have any search warrant either time. We did not have a warrant or search warrant when we went out to the garage [at another place in Berwyn] and seized the Plymouth. We went in through a window of the garage. We had the safe of the Union drilled. We forced entrance into it." (R. 24-25).

This witness also testified that when the State's Attorney's police kidnapped Rooney at Eagle River, Wisconsin, they brought him "to the State's Attorneys' office and turned him over to Mr. Coghlan and Mr. Wilbur Crowley," Assistant State's Attorneys (R. 24).

The defiance by the State of Rooney's constitutional guarantees was continued at the trial, when the State introduced into the record evidence illegally seized in the various "raids" referred to by Officer Pribyl, despite the fact that Rooney's motion to suppress the evidence had been sustained, and in the face of the confession of the motion by the State's Attorney (R. 22, 24-25). On review by the Supreme Court of Illinois of Rooney's conviction, the Court, while holding that the use of the illegally seized evidence was error and was improper conduct on the part of the State's Attorney, (*People* v. *Rooney*, 355 Ill. 613, 623-624,) concluded that the errors in this regard were not sufficiently prejudicial to warrant reversal.

All of the foregoing factors bear directly and immediately upon the matter of the motives of the prosecuting officers and their knowledge of the position of Davidson, and of the falseness of the testimony given by him at the trial.

Following his conviction and immediate incarceration respondent was subjected to further deprivation of his constitutional rights in that he was not permitted by the Warden of the State Penitentiary to seek redress in the courts *pro se*. He was without funds to retain counsel.

Respondent has been incarcerated in the Illinois State Penitentiary for almost fourteen years. The decision of the United States Circuit Court of Appeals does no more than afford him an opportunity to prove the averments of his petition.

ARGUMENT.

I.

The Circuit Court of Appeals properly held that in order to exhaust state court remedies so as to vest the federal court with jurisdiction, it was not necessary to pursue the Illinois statutory substitute for the common law writ of error coram nobis, because the five year limitation period within which the remedy is required to be brought, had elapsed and the remedy was therefore not available.

Petitioner here correctly contends that before jurisdiction by petition for habeas corpus may be entertained by a federal court it must appear that petitioner has exhausted the remedies available to him under the laws of the state of his incarceration. There are but two possible remedies under Illinois laws, (1) petition for writ of habeas corpus, and (2) motion for statutory writ of error *coram nobis*.

It is conceded Rooney has exhausted the first mentioned remedy.*

Petitioner here contends that the Illinois statutory substitute for common law writ of error *coram nobis* provided by Section 72 of the Illinois Civil Practice Act, (Ill. Rev.

* In listing the steps taken by Rooney to exhaust the remedy by habeas corpus in the Illinois courts, petitioner neglected to mention that Rooney petitioned for and was denied, (without opinion or comment,) the writ of habeas corpus by the Illinois Supreme Court on August 19, 1944 (R. 43). Rooney also petitioned for writ of certiorari from the United States Supreme Court to the Illinois Supreme Court. The petition was denied for the reason that the application was not made within the time provided by law (Rooney v. Ragen, 324 U. S. 851). Rooney had been unable to file his petition for certiorari at an earlier date because of the rule of the warden denying prisoners the right of access to the courts pro se.

Stat. 1945, Ch. 110, Sec. 196,) was available to Rooney and that he did not exhaust that remedy. Respondent asserts that the supposed statutory remedy was not available at the time he was for the first time enable to invoke *pro se* the jurisdiction of the District Court because the five-year statutory period for invocation of the statutory State court remedy had expired.

Judgment was rendered against Rooney August 12, 1933 (R. 20), his conviction was affirmed by the Illinois Supreme Court February 23, 1934, and a rehearing denied April 10, 1934 (*People* v. *Rooney,* 355 Ill. 613). His petition for habeas corpus was filed May 31, 1944 (R. 5), long subsequent to the expiration of the five year limitation period applicable to the statutory *coram nobis* proceeding.

Petitioner's contention is that the running of the five year limitation period was tolled because of petitioner's duress, in that Rooney was in the penitentiary and was denied the right to communicate with the courts *pro se.* Respondent's answer is that the *coram nobis* statute specifically provides that in order to toll the statute the petitioner must prove duress, "*at the time of passing judgment.*" (Ill. Rev. Stat. 1945, Ch. 110, Sec. 196. The statute is set forth in full at the bottom of page 7 of the Petition.) Rooney was not incarcerated "at the time of passing judgment," and it is obvious, therefore, that the duress upon which petitioner relies to toll the five year period is not that which is provided for in the statute. Petitioner has no answer to the express words of the statute; petitioner does not even comment on the statute.

The recent opinion of the Illinois Supreme Court in *People* v. *Rave,* 392 Ill. 435 (1946), squarely passed upon the question here in issue in its holding that incarceration in the State Penitentiary is not duress within the lan-

guage of the statute because such duress does not exist *at the time of passing judgment.* There petitioner was denied remedy under the statutory substitute of *coram nobis* on a motion filed more than five years after rendition of final judgment of conviction. The petition alleged that petitioner had been sentenced to life imprisonment under the Habitual Criminal Act on the basis of a prior conviction for burglary which was not a lawful conviction. The Court, in holding that the five year limitations period is tolled for duress only when the duress relied upon is present "at the time of passing judgment," said (pp. 443-45):

> "A further reason why plaintiff in error was not entitled to a hearing on his petition for a writ of error *coram nobis* is that said proceeding was not brought by the defendant within the period of five years after the rendition of final judgment in the case, as provided by section 72 of the Civil Practice Act. Plaintiff in error was last convicted on December 3, 1934, and his conviction was affirmed by this court on June 17, 1936, and rehearing denied on October 7, 1936. The petition for a writ of error *coram nobis* was not filed in the criminal court until November 10, 1944.
>
> "This question was raised by the State's Attorney in his motion to dismiss the petition for a writ of error *coram nobis.* Plaintiff in error says that the statutory period of five years does not apply to a person under duress and that one sentenced to life imprisonment certainly is not free to engage even in most necessary litigation and must be considered in duress. However, a reading of this section shows that *the disability or the duress must exist at the time of passing judgment.* • • • The serving of the sentence by the defendant subsequent to the passing of the judgment would not stop the running of the statute provided the defendant was not under duress *at the time of the passing of the judgment.* • • • We do not believe that this constitutes

duress within the meaning of said exception in the provision fixing the period of limitation at five years.

• • •

"Therefore, even if the plaintiff in error had a valid defense and was free from negligence in not presenting his defense *before* the rendition of the judgment in question, he is not entitled to relief in this proceeding, since the statute has run against him and he has no valid excuse for not commencing this proceeding earlier." (Emphasis ours.)

In *People* v. *Sprague,* 371 Ill. 627, quoted in the *Rave* opinion, Sprague was convicted of murder on a plea of guilty. Eleven years after his conviction he filed a motion alleging among other things that he was not represented by counsel and did not understand the effects of his plea. The court affirmed the denial of the motion holding that the motion for *coram nobis* under the statute was not available after the five years had elapsed.

In the very recent case of *People* v. *Touhy,* ..... Ill. ..... (No. 29984, March 19, 1947), the Illinois Supreme Court expressly affirmed the holding in the *Rave* case. The Court held that in accordance with the *Rave* opinion, the motion for *coram nobis* based on allegations of perjured testimony was properly dismissed because the motion was not made within the five year period.

Petitioner attempts to distinguish the *Rave* case on the ground that the acts of state prison officials in frustrating attempts of the prisoner to file petitions for *coram nobis* were not alleged or made the basis of any claim in the *Rave* case (Pet., pp. 9, 16). Such allegation of duress after judgment could not possibly have altered the decision in view of the holding that irrespective of the nature of the duress, it must have existed at the time of passing judgment in order to toll the statute. In order to confer juris-

diction on the Federal District Courts, it is sufficient if the peitioner shows that he has exhausted the state court remedies which "still remain open" (*Mooney* v. *Holohan*, 294 U. S. 103, 115). It is unnecessary to show that he has been deprived of one of the state court remedies by the illegal acts of a state official.

In *People* v. *Austin*, 329 Ill. App. 276, 67 N. E. 2d 88[illegible] (Abst. opinion, 1946), the Illinois Appellate Court had before it the identical issue here raised. The defendants filed a motion for the statutory substitute for writ of error *coram nobis* after the five year period of limitations had elapsed, setting forth an affidavit of recantation by the principal witness who had perjured himself at the trial. Defendants alleged that "their efforts to file a writ of error *coram nobis* were stopped because their petitions were never permitted to pass the prison gates" until abrogation of the above-mentioned practice. The Illinois Appellate Court held that such duress did not toll the statutory period of limitations because the duress did not exist at the time of passing judgment, as required by the statute. *Leave to appeal was denied by the Illinois Supreme Court* (330 Ill. App. ii).

Petitioner does not deny that the *Austin* case is directly in point, but urges that it is not authoritative because "decisions of the Illinois Appellate Court do not invoke *stare decisis* and are not binding on federal courts in ascertaining the Illinois law," (Pet., p. 10) and are no more authoritative "than are decisions of the circuit courts or justices of the peace" (Pet., p. 17). Petitioner fails to inform this Court that the Illinois Appellate Court Act was amended in 1935 to make the decisions of that Court binding upon other Illinois Courts under the rule of *stare decisis*.

Graham v. *White-Phillips Co.*, 296 U. S. 27 (1935), cited

by Petitioner in support of this proposition, was decided under the provisions of the former Illinois Appellate Court Act which provided:

> "• • • such opinions shall not be of binding authority in any cause or proceeding, other than in that in which they may be filed." (Smith-Hurd Illinois Rev. Stat. 1933, ch. 37, sec. 41).

Subsequent to the *Graham* case, that provision of the Act was repealed (Ill. Rev. Stats. 1945, Ch. 37, Sec. 41). The principle enunciated in the *Graham* case has been expressly rejected by numerous subsequent decisions of this Court, including one case involving a decision of the Illinois Appellate Court.

The law is clearly enunciated in *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169. There the Circuit Court of Appeals had recognized its duty to follow the law of the State, but took the view that it was bound only by the pronouncements of the state court of last resort. In an opinion reversing the decision of the Circuit Court of Appeals, Chief Justice Hughes said (pp. 177-178):

> "We think that this ruling was erroneous. • • • An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question."

The same question has arisen in numerous cases, especially since *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64. In each instance this Court has made the same holding (*Blair* v. *Commissioner,* 300 U. S. 5, 10; *West* v. *A. T. & T. Co.,* 311 U. S. 223, 237; *Stoner* v. *New York Life Ins. Co.,* 311 U. S. 464, 467; *Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U. S. 538, 543).

Petitioner makes the further argument that the *Austin* case is not authoritative because it is a decision of the Appellate Court on a constitutional question (Pet., pp. 9-10, 17). Admittedly the Appellate Court has no jurisdiction to decide a constitutional question, but no constitutional question was involved in the *Austin* case. The question before the Court was whether interference by prison officials with a prisoner's attempts to file a writ of error *coram nobis* tolls the statute of limitations. This in no way involved the construction of the Constitution. It is merely a question of interpretation of the limitations provisions of the statute, which was clearly within the jurisdiction of the Appellate Court to decide. Not without significance is the further fact, noted above, that the Supreme Court of Illinois denied leave to appeal in the *Austin* case.

The holding of the United States Circuit Court of Appeals on this point, based on the Illinois cases, is clear and correct:

> "Thus the law of Illinois is definitely settled that the remedy is unavailable after the expiration of the five year limitation period unless there was duress at the time of passing judgment; furthermore, that confinement in prison is not duress within the meaning of the statute. Thus this Illinois remedy was no longer available to petitioner, and any effort on his part to invoke such remedy would have been merely an idle and useless gesture." (R. 97).

At the time Rooney filed his petition for habeas corpus in the District Court, there was no state remedy which still remained available to him. In *Mooney* v. *Holoham*, 294 U. S. 103, this Court pointed out that the state court remedies coming within the rule are those which *"still* remain open." The Court said (p. 115):

> "Orderly procedure, governed by principles we have

> repeatedly announced, requires that before this Court is asked to issue a writ of *habeas corpus,* in the case of a person held under a state commitment, recourse should be had to whatever judicial remedy afforded by the State *may still remain open.''* (Emphasis ours.)

Substantially the same premise is expressed by the Court in *Ex Parte Hawk,* 321 U. S. 114, 118:

> "But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, *either because the state affords no remedy,* see *Mooney* v. *Holohan, supra,* * * * *or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate,* cf. *Moore* v. *Dempsey,* 261 U. S. 86; Ex parte Davis, 318 U. S. 412, a federal court should entertain his petition for habeas corpus, else he would be remediless." (Emphasis ours.)

Petitioner states repeatedly throughout his petition and brief that the Circuit Court recognized that its decision is in conflict with the opinion of this court in *Woods* v. *Nierstheimer,* 328 U. S. 311, 66 S. Ct. 996. This is an incorrect and wholly unwarranted statement. The Circuit Court discussed the *Rave* case and the *Austin* case, decided subsequent to the *Woods* decision, and held that the Illinois law is now definitely settled that the remedy is unavailable in the situation presented in the case at bar, and it would be a useless gesture for petitioner to invoke such remedy. The Court then clearly indicated that therefore the *Woods* decision was inapplicable, saying:

> "Certainly the Supreme Court in the *Van Woods* case did not intend to imply nor is this court required to hold that petitioner was required to engage in such futility.'' (R. 97).

The Circuit Court was entirely correct in holding the

Woods case inapplicable. The *Woods* case was before this court on certiorari to the Criminal Court of Cook County, Illinois, and the Circuit Court of Randolph County, Illinois, to review the final judgments of those courts denying petitions for writ of habeas corpus. That case did not involve any question of the jurisdiction of the Federal Courts to entertain jurisdiction on an original petition for habeas corpus. The petitions filed in the State Courts in that case alleged petitioner was innocent of the crime of which he had been found guilty and that he had been beaten with blackjacks and clubs, threatened with instant death, and tricked into signing a confession. The petitions further alleged that he was deprived of counsel until he was brought into court, and that when finally brought into court, the public defender who appeared as his counsel would not allow him to present his defense or to explain the circumstances surrounding the confession, and entered a plea of guilty against petitioner's will. It was further alleged that both the public defender and the State's Attorney threatened petitioner by telling him he would burn in the electric chair if he did not keep his mouth shut.

Counsel for the State conceded that the allegations, if true, would violate due process. But, it was contended that the denial of the applications for habeas corpus was not based on the decision of the federal question of violation of due process, but was based on the non-federal ground that habeas corpus was not the proper remedy under Illinois law. The holding of this Court was that it had no power to review the judgments because under the Illinois law the denials of the applications for habeas corpus probably rested on the non-federal ground that habeas corpus was not the proper remedy in the case presented to the court.

It was argued by counsel for petitioner that *coram nobis* was the only other possible remedy and since the five year period of limitations for *coram nobis* had expired, the denial of the petitions for habeas corpus left him without any remedy in the State courts, and therefore a federal question was raised and the *coram nobis* limitations statute was unconstitutional.

It should be noted that the adoption of this argument would not have changed the Court's decision. Even if *coram nobis* were not available and if the statute were unconstitutional, it would not change the determining fact in the case that the denial by the State courts of the applications for habeas corpus probably rested on the nonfederal ground that habeas corpus was not the proper remedy. The unavailability of *coram nobis* could not affect the scope of the State habeas corpus writ. The only issue before this Court was whether to dismiss the petitions for certiorari or to reverse the holdings below which denied petitioner an opportunity to prove his allegations in the habeas corpus proceedings in the State courts.

This Court made several answers to the ingenious but specious argument of Woods' counsel. Certain of them appear in the excerpt from the opinion printed in petitioner's brief in the case at bar (Pet., p. 18). This Court's final answer, not quoted by petitioner, was that if no remedy was available in the State courts, the federal courts would be available to provide a remedy.

Petitioner here relies on the statement of this Court in the *Woods* opinion that it could not be said that the five year limitation statute would be construed by the Illinois courts to bar the *coram nobis* remedy to petitioner on the

facts there present.* That statement is certainly true because there was a factual issue which required the construction of the statute. The issue was whether the duress there alleged was sufficient to toll the statute. Since the physical duress, trickery and threats of death all existed at the time of passing judgment, the duress was of the kind which might well fall within the language of the statute. However, in the case at bar, the alleged duress was not present at the time of passing judgment, as specifically required by the statute. Therefore, the alleged duress could not possibly have been held to have tolled the running of the statute. The *Woods* case is not in point in the case here presented to the Court. Also, the *Austin* case has determined that the denial of prisoner's rights to communicate with the courts does not constitute duress within the meaning of the statute.

Counsel for petitioner cites the *Woods* case for the proposition that it must be presumed that the *coram nobis* remedy is available even after five years *because State officials have frustrated petitioner's attempts to communicate with the courts during that time* (Pet. pp. 19, 9, 16). This type of duress was not even mentioned in the *Woods* case! The duress alleged was various forms of physical and mental coercion which occurred before and at the time of passing judgment. Counsel must have assumed that this Court in the *Woods* case took judicial notice of the acts of the warden without mentioning that it was doing so. Even if that is the fact, the *Woods* case merely serves as a guide to

*On September 20, 1946, subsequent to the Woods opinion in this court, the Illinois Supreme Court denied Woods' petition for leave to appeal from the dismissal of a coram nobis motion by the Criminal Court of Cook County (Woods v. People of Illinois, —— Ill. ——, September Term, 1946, No. 29747).

the Illinois law as of that time it was decided. That law has been settled by the holding in the *Austin* case that such acts of the warden do not constitute duress which tolls the statute of limitations. Even under the holding in the *Rave* case, (392 Ill. 435,) such acts would not constitute duress because they occurred after the passing of judgment. Incidentally, it should be mentioned that counsel for petitioner is correct in stating that the *Rave* case was called to the attention of this Court in the briefs in the *Woods* case. However, in the *Woods* case counsel quoted only one sentence which sentence was urged in support of another point and therefore the statement in the opinion of the Circuit Court is substantially accurate.

II.

The Circuit Court of Appeals properly held that the petition for habeas corpus, with or without the attached affidavits sufficiently alleges that the perjured testimony, through the use of which the conviction was obtained, was procured and used with the knowledge or active connivance of the prosecution.

The petition for habeas corpus alleges that Davidson's testimony was perjured, and that a conviction could not have been obtained without Davidson's testimony. Petitioner here admits that in the affidavits attached to the petition for habeas corpus Davidson deposes "that the testimony that he gave against respondent at respondent's trial was perjured and that respondent was in fact innocent" (Pet. Br., p. 19), and that the conviction was based on the testimony of Davidson (Pet. Br., p. 3). Thus the only issue raised by petitioner is whether the petition for habeas corpus sufficiently alleges, as against a general motion to dismiss *which does not challenge the form of the allega-*

tions, that the prosecuting officials had knowledge that the testimony was false.

On this issue, the motion to dismiss the petition for habeas corpus merely stated that the petition alleged "no violation of the Constitution of the United States". (R. 52) It contained no assertion of the alleged defects of form now relied upon in this Court. Although the opinion of the Court below did not mention the point, it might well be held that this issue was not raised by the general motion to dismiss.

The gist of petitioner's argument on this point is that although Davidson in his affidavit states that in his interviews with the prosecuting officers he first denied that respondent was guilty of the crime and then changed his story so as to affirm respondent's guilt in consideration for leniency, a job on the public payrolls, and other ulterior considerations, nevertheless this does not charge that the prosecuting officials knew the testimony was perjured (Pet., p. 10, 19). This argument ignores the issue and places undue emphasis upon the Davidson affidavit. The issue is whether the petition for habeas corpus considered together with all the supporting papers, including Davidson's affidavit, substantially alleged knowledge on the part of the prosecuting officers. The holding of the Circuit Court was that the habeas corpus petition, aside from Davidson's affidavit sufficiently charged that the prosecuting officials knew that Davidson's testimony was perjured. The Court said (R. 92-93):

> "The petition, of course, would have been in more perfect form if it had directly alleged knowledge, but we are of the view that these allegations taken together, and when liberally construed in favor of the petitioner as they must be, substantially allege knowl-

edge or, in the words of the Supreme Court in the *Hysler* case, *supra*, 'active conduct or connivance' on the part of the prosecution.

"It must be borne in mind that what we have said has to do only with the sufficiency of the petition to entitle the petitioner to a hearing, providing the court otherwise has jurisdiction. As already indicated, we think too much importance has been attached to Davidson's affidavit. The fact is it is of no consequence except as it is made a part of the petition and furnishes support thereto."

Petitioner makes no argument that the habeas corpus petition does not allege knowledge on the part of the public officials. The entire argument is directed to the Davidson affidavit alone. From the false premise that the sufficiency of the petition is to be determined solely by the sufficiency of the Davidson affidavit, petitioner argues that the Circuit Court held that bargaining with an accomplice constitutes a denial of due process (Pet. pp. 11, 19). The obvious purpose of such distortion of the holding of the Court is to create the erroneous impression that a new precedent of "crucial" importance would be created if respondent be afforded a hearing in this case.

We have set forth in the supplemental statement of the case the averments of the petition relating to the prosecuting officers' knowledge. We shall not repeat them here. The petition, when taken as a whole, sufficiently charges knowledge. Although the petition was drawn by a layman unskilled in the drafting of legal papers, the averments, including particularly the quotations from cases relating to convictions obtained upon "knowingly procured" false testimony, leave no doubt of the intended meaning, and are sufficient as against a general motion to dismiss. (Cf. *Cochran* v. *Kansas*, 316 U. S. 255, 257.)

In the recent case of *Tomkins* v. *Missouri*, 323 U. S. 485, 487, this Court aptly stated the rule by which federal courts are to be guided in considering the sufficiency of pleadings drawn by unskilled prisoners. It said:

> "The petition is not drawn with the desirable precision and clarity. But we can hardly demand of a layman and pauper who draws his petition behind prison walls the skill of one trained in the law. If we were to take that course we would compound the injury caused by the original denial of counsel. A deprivation of the constitutional right of counsel should not be readily inferred from vague allegations. But where the substance of the claim is clear, we should not insist upon more refined allegations than paupers, ignorant of their right of counsel and incapable of making their defense, could be expected to supply."

To the same effect, on the question of technical sufficiency of the petition, see *Rice* v. *Olson*, 324 U. S. 786, 791; *Holiday* v. *Johnston*, 313 U. S. 342, 350, 351; *Bowen* v. *Johnston*, 306 U. S. 19. In the *Rice* case, above, this Court commended the Supreme Court of Nebraska for treating "this clumsily drawn petition with liberality, instead of dismissing it because of a failure to comply with the precise niceties of technical procedure. * * * And this treatment is in line with federal practice."

Furthermore, the petition must be considered as a whole. Where thus considered it discloses an elaborate, persistent, studied and pernicious plan and course of improper conduct on the part of the State prosecuting officers. The facts alleged, and admitted by the motion to dismiss, show that the prosecuting officers knew of the bargain made with Davidson as part of the previously conceived plan. The bargain was consummated when Davidson was presented before the jury as vouched for by the prosecutor and the

sovereign state he represented. A conviction was secured on the basis of his testimony. Petitioner argues that in cases of this kind no harm has been done, because the alleged accomplice who "turned states evidence" is subjected to cross-examination which reveals that his testimony was given as the result of promised lenity (Pet. p. 20). That was not true here because the prosecuting officers sat silently by while Davidson perjured himself on cross-examination about the agreement to which they were a party. The record shows that at the trial Davidson was asked: "Have you been indicted in this case?" and that he answered:

> "Never. Nobody talked to me about the possibility of my being indicted. Nobody ever suggested that I might be. It occurred to me that I might be. When it occurred to me I did not talk to anybody about it in these interviews. I never asked the State's Attorney what he might do with me. Nothing like that had come up in the conversations. *I do not know what will happen to me, I have no idea.*" (R. 47).

Counsel argues further that the question whether the confederate is committing perjury "is left to a jury upon full disclosure of the interest of the accomplice in helping to secure a conviction of co-defendants" (Pet., p. 21). We ask, "How can that function be fulfilled when the jury is unaware of the bargain that preceded and procured the perjured testimony upon which they base their conviction, and when the witness does not recant his testimony until *after* the trial and conviction has been had?"

CONCLUSION.

We believe that we have demonstrated that the decision of the Circuit Court of Appeals is correct. The petition for writ of certiorari should be denied because the decision below presents no question justifying issuance of the writ either in the exercise of this Court's supervisory powers or under the rules laid down to govern the granting of such writs.

In justice to Mr. Rooney the following facts should be brought to the attention of this Court. Mr. Rooney was convicted in 1933. Although it does not appear when he first learned of the facts set forth in his petition, it may be presumed that this was shortly after Davidson's first affidavit in 1936 filed in support of the petition of one Berry for parole. The rule barring resort to the Courts was then in effect and so remained until 1943 when the then Warden of the Illinois State Penitentiary abrogated the rule. Rooney promptly sought in vain to have his complaint heard by petitions for habeas corpus in the Circuit Court of Will County, the Criminal Court of Cook County and the Supreme Court of Illinois. He petitioned this Court twice for certiorari to review these decisions. In May 1944 he filed his petition for writ of habeas corpus in the Federal District Court. Thus, after fourteen years Rooney is still waiting for a hearing on the merits of his claim that he is illegally incarcerated.

The Attorney General would now have this Court say to Mr. Rooney: "Although what you intended to say is obvious to everyone concerned, yet to satisfy legal technicalities, you must insert the word 'knowingly' in your petition. Furthermore, although it is apparent that the *coram*

nobis remedy will be denied you by the Illinois courts because the statute of limitations has run, nevertheless you must make the idle gesture of filing a *coram nobis* motion in the Illinoils courts. Then come back to the Federal District Court and that Court will grant you a hearing on the merits of your petition." Can it possibly be said that the ends of justice would be served by the granting of this petition for certiorari under such circumstances?

With all due deference to the skill and unquestioned good faith and fairness of our learned opponents, we respectfully suggest that the arguments they have advanced before this Court fall within the category of technicalities recently criticized by Judge Elwyn R. Shaw in *U. S. ex rel. Howard* v. *Ragen*, 59 F. Supp. 374 (Ill.). Although the determining facts there were distinguishable from those of the case at bar, the concluding paragraph of the opinion is most appropriate:

> "Technical arguments may very well be indulged in behalf of liberty. They may not be resorted to by the Government in restraint of liberty. The State is sovereign and neither needs nor can accept any technical advantage over a subject."

Respectfully submitted,

ALBERT E. JENNER, JR.,
ROGER W. BARRETT,
Counsel for Respondent.